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Supreme Court, U. S.

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No. 95-1794

In The  
**Supreme Court of the United States**  
October Term, 1995

THOMAS MASOTTO,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Second Circuit

**SUPPLEMENTAL BRIEF IN SUPPORT OF  
PETITION FOR A WRIT OF CERTIORARI**

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Thomas Masotto submits this supplemental brief in support of his petition for a writ of certiorari.

In *Roy v. Gomez*, 81 F.3d 863 (9th Cir. 1996), the *en banc* Court of Appeals for the Ninth Circuit was confronted, in a habeas context, with a jury instruction analogous to the instruction held to be erroneous but harmless in *United States v. Masotto*, 73 F.3d 1233 (2d Cir. 1996).

The California state court in *Roy* erroneously gave an aiding-and-abetting instruction that failed to instruct the jury that the state was required to prove that the defendant intended to encourage or facilitate commission of the substantive offense. The state court of appeals concluded instructional error had occurred, but held the error was harmless. A divided panel of the Ninth Circuit affirmed the denial of Roy's habeas petition.

The question before the *en banc* Ninth Circuit was whether the state court's error in failing to instruct the jury properly on aiding-and-abetting intent was subject to harmless-error analysis. The Ninth Circuit, with three judges dissenting (Wallace, Hall and Rymer, JJ.), reversed. Applying Justice Scalia's concurrence in *Carella v. California*, 491 U.S. 263 (1989), it held harmless-error review of the trial court's failure to instruct the jury on the requisite intent for aiding-and-abetting liability was narrowly limited:

[T]he omission is harmless only if review of the facts found by the jury establishes that the jury necessarily found the omitted element.

On the record in this case, we cannot be certain the jury necessarily found beyond a reasonable doubt that Roy intended to facilitate . . . the robbery . . . , as required under *Carella* . . . before the instructional error can be treated as harmless. Although there was evidence from which a jury could have found that Roy intended to facilitate [the] robbery, there were no findings from which we could conclude the jury actually did so.

*Id.* at 867 (footnote and citations omitted).

This divergence of opinion within the Ninth Circuit – and among other circuits, as indicated in the petition for writ of certiorari Mr. Masotto has filed – suggests the opinion in *Roy* may also be the subject of a petition for writ of certiorari. The issue presented by the *Roy* decision is closely related to the question Mr. Masotto has presented in his petition.

Dated: May 21, 1996.

Respectfully submitted,

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